differentiate among different categories of station owners for purposes of the national TV ownership rule.[1199]

580 The next task is to determine what the ownership limit should be. As the court in *Sinclair* recognized, the Commission has wide discretion when drawing administrative lines.[1200] Having found that 35% is too low and 100% (or no limit) is too high, after considering the evidence in the record, we apply our discretion and raise the national ownership cap to 45%. This modification, fundamentally, is a line-drawing exercise in which we attempt to balance the benefits of a television ownership cap against the factors favoring an incremental increase. Finding a point between 35% and 100% is a matter of judgment falling within the particular expertise of the Commission.[1201]

581 We have decided to modify the national cap by raising it 10 percentage points for three primary reasons.[1202] First, while affiliates argue that it is necessary to preserve a balance of power between networks and affiliates so that affiliates can maintain adequate preemption rights, it is evident that networks can exceed a nationwide audience reach of 35% without harming affiliates' abilities to preempt network programming As discussed above, affiliates of networks with a national reach of greater than 35% seem to have no less bargaining power than affiliates of networks with less than 35% national reach. In accordance with Section 202(h), therefore, the cap must be modified upward. The record does not, unfortunately, help us identify with any precision the point at which a network audience reach would be so large that affiliate bargaining power would be substantially undermined. Given that we are interested in finding a point at which the balance of power between networks and affiliates is roughly equal, however, we believe that a national audience reach cap of approximately half of all homes would be appropriate

582. Second, we are mindful of the predictive nature of this line-drawing exercise and we have some concern about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits. Accordingly, and in light of the fact that Congress raised the ownership cap by ten percentage points in 1996, from 25% to 35%, we are inclined to take a similarly incremental approach and increase the cap by an additional 10 percentage points. Although a cap of 45% does not equate to a precisely equal degree of national reach for networks

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[1199] *See 1984 Multiple Ownership Report and Order*, 100 F.C C 2d at 50-54 ¶¶ 97-107, *1985 Multiple Ownership MO&O*, 100 F C C 2d at 87 ¶ 30 n 36 (since the adoption of a national TV ownership restriction, the limitations "have been applied in a uniform manner to all industry participants")

[1200] *Sinclair*, 284 F.3d at 162.

[1201] *AT&T Corp v FCC*, 220 F 3d 607, 627 (D C Cir 2000) (the Commission "has wide discretion to determine where to draw administrative lines"), *Cassell v FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"); *Health and Medicine Policy Research Group, et al v FCC*, 807 F 2d 1038, 1043 (D.C. Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"), *Hercules Inc. v. EPA*, 598 F 2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness"). *See also* Letter from Jonathan D Blake, Counsel for NASA, and Henry L Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (April 30, 2003) at 1.

[1202] *But see* Letter from Jonathan D Blake, Counsel for NASA, to Marlene Dortch, Secretary, FCC (May 8, 2003) Attachment at 7 (no evidence to support raising the cap to 40%, 45% or 50%) ("NASA May 8, 2003 Ex Parte").

and their affiliates, a 45% limit ensures that networks will not obtain a greater national audience reach than their affiliates collectively will have.

583. Finally, although we elect not to modify the cap to the point advocated by Paxson (50%), we agree with Paxson that the cap should "accommodate all existing broadcast combinations and give some additional room for growth."[1203] A 45% cap will allow some, but not unconstrained, growth for each of the top four network owners[1204] Broadcast networks have lost market share in recent years to cable and DBS, and allowing them to achieve better economies of scale and scope may help them remain competitive in the marketplace.[1205] Further, given the rise in programming costs and increasing competition from non-broadcast national media, the economies of scale and scope made possible by network expansion of station ownership will contribute to the preservation of over-the-air television by deterring the migration of expensive programming, such as sports programming, to cable networks.[1206] Accordingly, we herein modify the national audience reach rule to impose a 45% cap.

584. Although we affirm our finding in the *1984 Multiple Ownership Report and Order* that increased network ownership of stations will not harm either competition or diversity,[1207] our decision to retain a national ownership cap is a departure from our conclusion in 1984 that the national TV ownership rule should be repealed.[1208] In 1984, we gave very limited consideration to the potential effects of the cap

[1203] Paxson Comments at 13-15 We decline to adopt Paxson's suggestion that we establish a presumption to increase the cap biennially by at least 2 5% until it reaches 60% *Id*

[1204] Under the current rule, ABC owns ten stations reaching 23 6% of the national audience; CBS owns 39 stations reaching 39% of the national audience (these stations include the CBS as well as the UPN owned and operated stations, including 3 satellite stations); Fox owns 37 stations reaching 37.8% of the national audience (includes two satellite stations), and NBC owns 29 stations reaching 33 6% of the national television audience (these stations include the NBC as well as the Telemundo owned and operated stations, as well as a station located in Puerto Rico) *The Top 25 TV Station Groups*, B'CASTING AND CABLE (Apr. 7, 2003) at 32-34. There are currently 1,340 commercial television stations licensed by the Commission The percentage of these television stations owned by each of these networks is as follows ABC owns less than 1%, CBS owns approximately 3%; Fox owns approximately 3%; and NBC owns approximately 2%.

[1205] Paxson Comments at 10 (due to competition from cable and DBS, network prime time viewership has declined to 57%) (citing *2001 Video Competition Report*, 17 FCC Rcd at 1282). *See also* Letter from Jared S. Sher, Counsel for Fox, to Marlene Dortch, Secretary, FCC (April 30, 2003), Attachment at 52-54 We disagree with NAB/NASA that network profitability is not a valid reason for raising the national cap in this proceeding. *See* Letter from Jonathan D. Blake, Counsel for NASA, and Henry L Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (April 23, 2003) at 1-2; NASA May 5, 2003 Ex Parte at 2-3, NASA May 8, 2003 Ex Parte, Attachment at 5-6

[1206] Fox Comments at 43 (the rule limits the return that networks can earn on their programming investments and drives them to direct their resources away from free television and toward subscription-based cable channels) Viewers complain that desirable programming already has begun migrating to subscription-based outlets. Thomas Smith Comments at 4, *see also* NABET-CWA Reply Comments at 2; The Grange Reply Comments at 3; Fox May 2, 2003 Ex Parte at 16, Letter from John C Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 12, 2003), Attachment 2 at 5-7.

[1207] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 50-54 ¶¶ 86, 97-107.

[1208] *See id* at 18-20 ¶¶ 4-10

on localism.[1209] That attention was devoted to the quality and quantity of news and public affairs programming on group-owned versus individually-owned stations.[1210] In this *Report and Order*, by contrast, we have expanded our "localism" measures to include the important consideration of program selection by local stations. The 1984 decision did not address the balance of power between networks and affiliates and how that affects program selection.[1211] It is this factor that is the central factor in our decision to retain a national cap.

4. UHF Discount

585 In the *Notice*, the Commission invited comment on the relevance and continued efficacy of the 50% UHF discount.[1212] The *Notice* explained that the discount was enacted because UHF stations were competitively disadvantaged by weaker signals and smaller household reach than VHF stations.[1213] In light of greater carriage of UHF stations on MVPDs since enactment of the UHF discount in 1985, we sought comment on the continued need for the UHF discount

586. We conclude that the UHF discount continues to be necessary to promote entry and competition among broadcast networks. VHF signals typically reach between 72 and 76 miles, while UHF signals reach approximately 44 miles. This signal disparity results in a significantly smaller household reach of UHF signals compared with VHF signals. Fox, NBC and Viacom submitted data showing that, in markets where they own both a UHF and a VHF station, the UHF station reaches between 56% and 61% of the service area of their VHF stations.[1214] Similarly, Paxson states that in eight cities where it owns UHF stations, its stations reach between 35.7% and 78 2% of the homes reached by VHF stations in those markets.[1215]

587. This diminished UHF signal area coverage affects UHF stations' ability to compete with VHF stations in two ways First, although cable and DBS operators serve 86% of U.S. households, the Commission recently determined that roughly 30% of television sets are not connected to MVPD service

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[1209] In our 1984 decision, we acknowledged that "network-owned stations have rendered meritorious service to their local communities " *Id.* at 53 ¶ 105 This observation, which continues to hold true, does not, however, negate the importance of the affiliates' role in furthering localism.

[1210] *Id* at 31-36 ¶¶ 44-56.

[1211] *See* Cox Comments at 9, Letter from Jonathan D Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to Marlene Dortch, Secretary, FCC (May 9, 2003), Attachment at 2; Letter from Jonathan D. Blake, Counsel for NASA, and Henry L Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (May 15, 2003) at 1-2

[1212] *Notice*, 17 FCC Rcd at 18545 ¶¶ 130-131. The UFH discount is intended to recognize the deficiencies in over-the-air UHF reception in comparison to VHF reception.

[1213] *Id* at 18545 ¶ 130.

[1214] Letter from John C Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 20, 2003) ("Fox May 20, 2003 Ex Parte").

[1215] Letter from John R Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 16, 2003) at Attachment 3.

and receive exclusively over-the-air broadcast stations.[1216] UHF stations reach far fewer of these broadcast-only viewers as VHF stations. Second, weaker UHF signals make it more difficult for a UHF station to qualify for cable and DBS carriage. Commission regulations require a local television station to place a Grade B signal over the cable or DBS headend in order to quality for carriage.[1217] Alternatively, if a station does not place a Grade B signal over the headend, it may pay for an alternative method of delivering its signal to the headend, such as a fiber optic connection [1218] Non-carriage on a cable system will, as a practical matter, make the UHF station unavailable to homes in the MVPD's service area.

588. In addition to diminished signal coverage, UHF stations require between 1.5 and 3 times greater electricity costs to operate than VHF stations.[1219] UHF stations also require more expensive transmitters than VHF stations.[1220] These factors, along with the signal coverage disparity, appear to diminish the ability of UHF stations to compete in the delivered video programming market. According to a 1997 study provided by Paxson, VHF affiliates of the top four broadcast networks had approximately 50% higher ratings than UHF affiliates of the top four networks.[1221] Paxson then replicated this study with 2002 ratings information and determined that the ratings disparity between UHF and VHF stations had actually *increased* between 1997 and 2002. Paxson's filing shows that, in November of 2002, network-affiliated VHF stations received approximately 57% higher ratings than network-affiliated UHF stations, compared with 50% in 1997.[1222] Thus, even after controlling for factors such as programming and market size, UHF stations continue to experience a competitive handicap compared with VHF stations. This disparity translates into reduced advertising revenues for UHF stations.[1223] Thus we disagree with UCC that the UHF handicap has largely been eliminated by greater cable and DBS carriage of UHF signals.[1224]

589. In addition to strengthening competition between UHF and VHF stations, the UHF discount promotes entry by new broadcast networks. Paxson asserts that UHF discount enhanced its ability to launch a new broadcast network because it could own more UHF stations than VHF stations. Paxson states that the additional ownership of stations permitted by the UHF discount provides a significant

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[1216] *2001 Video Competition Report*, 17 FCC Rcd at 1282 ¶ 79

[1217] 47 C F R § 76 55(c)(3)

[1218] 47 C F R § 76 66(g)

[1219] Letter from John R Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 7, 2003) ("Paxson May 7, 2003 Ex Parte"), Attachment C at 11.

[1220] *Id*

[1221] Paxson May 7, 2003 Ex Parte, Attachment C at 9 (stating that VHF-based affiliates received a 9 6 prime time rating compared UHF affiliates' 6 4 rating).

[1222] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 30, 2003), Attachment at 2

[1223] Fox May 20, 2003 Ex Parte, Declaration of Michael Ward, General Manager, WNCN(TV) (stating that advertisers routinely discount the prices paid for advertising on UHF stations versus VHF stations)

[1224] UCC Comments at 57-58

financial incentive for new networks to enter and compete with established networks.[1225] This is because ownership of stations, as opposed to affiliation with separately-owned stations, enables a network such as Paxson's to earn both national and local advertising revenues.[1226] Univision also states that the UHF discount has enabled it to enter the market with programming tailored to Hispanic audiences. Univision explains that its entry as a broadcast network is particularly beneficial to Hispanic audiences because they rely disproportionately on over-the-air broadcast channels.[1227]

590 Finally, we observe that the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations. The four most established broadcast networks collectively own 67 stations, 12 of which are UHF stations.[1228] Instead of replacing their VHF stations with UHF stations and owning up to 70% national coverage, they have retained their VHF stations and sought elimination of the national ownership cap. By contrast, Paxson, a recent entrant into the broadcast network business, owns 61 stations, all of which are UHF.[1229] Absent the UHF discount, Paxson's audience reach would be 61.8% of the nation's television households. This data indicates that the UHF discount plays a meaningful role in encouraging entry of new broadcast networks into the market For these reasons, we retain the UHF discount.

591. The Commission has previously said it will issue a notice of proposed rulemaking proposing a phased-in elimination of the discount when DTV transition is near completion.[1230] At this point, however, it is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized Therefore, we will sunset the application of the UHF discount for the stations owned by the top four broadcast networks (*i e.*, CBS, NBC, ABC and Fox) as the digital transition is completed on a market by market basis. This sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition. For all other networks and station group owners, we will continue to examine the extent of competitive disparity between UHF and VHF stations as well as the impact on the entry and viability of new broadcast networks. In a subsequent biennial review, we will determine whether to include stations owned by these other networks and station group owners in the sunset provision we have established for stations owned by the top four broadcast networks

B. Dual Network Rule

592. The dual network rule provides· "A television broadcast station may affiliate with a person

[1225] Paxson May 7, 2003 Ex Parte, Attachment C at 18.

[1226] *Id*

[1227] Univision Reply Comments at 6 (52 8% of Hispanic television households in the top 30 markets subscribe to cable television This compares with 67 8% of U S households that subscribe to cable overall.). *See* OPP Working Paper 37 at 41.

[1228] *The Top 25 Station Groups*, BROADCASTING & CABLE, Apr. 7, 2003

[1229] Paxson owns 61 stations, 60 of which belong to the PAX television network. Paxson also owns a station that is affiliated with ABC *Id* *See also* Paxson Comments at 2

[1230] *1998 Biennial Review Report*, 15 FCC Rcd at 11079-80 ¶ 38.

or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in § 73 3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[1231] Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top-four" networks, *i e.*, ABC, CBS, Fox, and NBC. In this *Order*, we conclude that the dual network rule is necessary in the public interest to promote competition and localism.

1. Background

593. The original dual network rule, which prohibited any entity from maintaining more than a single radio network, was adopted over sixty years ago.[1232] The rule was later extended to television networks [1233] The Commission believed that an entity that operated more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be affiliated with the more powerful network entity [1234] In addition, the Commission expressed concern that ownership of more than one network could give the owner too much market power.[1235] The rule, therefore, was intended to serve the Commission's competition and diversity goals [1236]

594. In the 1996 Act, Congress directed the Commission to amend the rule,[1237] which it did, to permit common ownership of two or more broadcast networks, but not a merger among ABC, CBS, Fox, or NBC, or between one of these top-four networks and UPN or WB.[1238] In 2001, the Commission further modified the rule to permit a top-four network to merge with or acquire UPN or WB.[1239] The Commission found that: (1) competition in the national advertising market would not be harmed; (2) greater vertical integration was potentially an efficient, pro-competitive response to increasing competition in the video market, and (3) program diversity would not be harmed because the two

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[1231] 47 C F R § 73 658(g).

[1232] 6 Fed Reg. at 2282 (May 6, 1941)

[1233] *Amendment of Part 3 of the Commission's Rules*, 11 Fed Reg. 33 (Jan 1, 1946).

[1234] *1998 Biennial Review Report*, 15 FCC Rcd at 11095-96 ¶ 70.

[1235] *Id*

[1236] *Id*

[1237] Section 202(e) of the 1996 Act directed the Commission to modify the dual network rule to prohibit a television station from affiliating with any entity that owns more than one of the four major networks (ABC, CBS, Fox, or NBC) or one of the four major networks and an emerging English-language network which, on the date of the 1996 Act's enactment, "provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes " 1996 Act, § 202(e) The legislative history of the "emerging network" provision indicated that it was intended to apply to only the UPN and WB television networks *See* S. Rep No. 230, 104th Cong , 2d Sess at 163.

[1238] *See* note 1065, *supra*

[1239] *Dual Network Order supra* note 97.

combined networks would have economic incentives to diversify their program offerings.[1240]

595. The restrictions in the current rule apply only to combinations of the top-four networks. All existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. Thus, the current rule permits common ownership of multiple broadcast networks created through internal growth and new entry.

596. Although the dual network rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations may operate multiple broadcast networks. Specifically, the rule permits ABC, CBS, Fox, and NBC to develop multiple broadcast networks by: (1) creating new broadcast networks, (2) acquiring new broadcast networks; or (3) acquiring video networks from non-broadcast media (*e g.*, cable or satellite) and migrating them to broadcast networks However, the rule prohibits ABC, CBS, Fox, and NBC from developing multiple broadcast networks by merging with one another.

597. In the *Notice*, we sought comment on whether the present dual network rule is necessary in the public interest as the result of competition We asked whether it promotes the goals of competition, diversity, or localism We further asked whether, if the rule serves some of our purposes and disserves others, the balance of its effects argue for keeping, modifying, or abolishing the dual network rule.[1241]

598. Despite the voluminous record developed in this proceeding, few commenters addressed the dual network rule.[1242] Several commenters assert that the top-four networks are unique in that they regularly compete against each other for viewers (*i e.*, their programming is targeted at similar national audiences, as opposed to the niche audiences smaller broadcast networks and cable networks target), that they each consistently generate the largest national audiences for their programming (thereby receiving the most advertising revenue, which, in turn, provides the funding to purchase the most desired programming), and that competition would be harmed by allowing any of them to merge.[1243] Several commenters also assert that concentration of ownership in the top-four networks would result in harms to diversity by providing fewer national and local viewpoints in news reporting and fewer programming choices for viewers.[1244] One commenter also argues that localism would be harmed by a top-four network merger because the merger would increase the economic leverage the networks have over their affiliates [1245] The sole commenter arguing for elimination of the rule, Fox, asserts that competition will

[1240] *Id.* at 11124-25, 31 ¶¶ 24-25, 37

[1241] *Notice*, 17 FCC Rcd at 18552-53 ¶ 159.

[1242] Those specifically mentioning the dual network rule in their comments are. AFL-CIO, AFTRA; CCC; Children Now, CWA; Fox, NAB/NASA; Smith, Stapleton; UCC; and Writers Guild. Of these eleven commenters, five devoted one paragraph or less to a discussion of the rule

[1243] *See* CCC Comments at 17, NAB/NASA Comments at 73-74, 77; Stapleton Comments at 16; Writers Guild, *et al.* Comments at 16.

[1244] *See* AFL-CIO Comments at 63-64, AFTRA Comments at 36-38, CCC Comments at 18-19, UCC, *et al.* Comments at 59-60; Writers Guild, *et al* Comments at 14.

[1245] *See* NAB/NASA Comments at 75-76

not be harmed because consumers have access to a vast array of other media outlets, that diversity will be maintained because common network ownership provides incentives to produce a diverse schedule of programming, and that localism will not be affected because stations have strong financial incentives to provide local programming regardless of their network affiliation.[1246] We analyze these arguments below in discussing whether the rule is necessary in the public interest as the result of competition.[1247]

2. Discussion

599. Under Section 202(h), we consider whether the dual network rule continues to be "necessary in the public interest as the result of competition." In determining whether the rule meets this standard, we consider whether the rule promotes competition, localism, and diversity. We conclude that the dual network rule continues to be necessary in the public interest to promote competition and localism

a. Competition

600. We begin by summarizing the complex roles played by broadcast networks. Broadcast networks acquire a collection of programs from program producers The programs are selected based on their ability to attract audiences that can be sold to advertisers. These programs - with advertisements embedded - are then made available to television audiences through the broadcast network's owned and operated broadcast television stations ("O&Os"), and also through contractual arrangements with affiliated broadcast television stations. Thus, a broadcast network serves many roles. It is an intermediary between local broadcast stations and advertisers and program producers. Because the top-four broadcast networks are participants in the program acquisition market and the national advertising market, mergers among them can affect competition in each of these markets.

601. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a "strategic group"[1248] in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. As a result, we conclude that the dual network rule remains necessary in the public interest to foster competition.

(i) Program Acquisition Market

602 The top-four networks are the broadcasting components of vertically-integrated firms, which compete against each other to acquire programming that will attract the largest national audiences [1249] Competition in the program acquisition market is important because networks compete

[1246] *See* Fox Comments at 44-45, 47-48.

[1247] In its Comments, NAB/NASA states that "NAB takes no position on whether the Commission should retain the current version of the dual network rule." NAB/NASA Comments at 72; NAB/NASA Reply Comments at 57. The arguments opposing changes to the dual network rule are therefore made by NASA.

[1248] A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies *See* footnote 1262, *infra*, for a discussion of strategic groups.

[1249] ABC (a broadcast network) is vertically integrated with Disney (a program supplier); CBS (a broadcast network) is vertically integrated with Viacom (a program supplier); Fox (a broadcast network) is vertically (continued .)

with each other to acquire new, diverse, and innovative programming A top-four network merger would give rise to competitive concerns that the merged firm would restrict the consumption of programming by using its market power to limit competitors' access to sources of programming. In addition, the merged network could use its market power to control the price it pays for programming or to raise competitors' costs of acquiring programming. In concentrated markets, viewers have access to fewer programming choices if the number of national, independent purchasers of programming decreases due to limited access to programming and higher programming costs.

603 NASA argues that a merger of two or more of the top-four networks would result in a less competitive program acquisition market, evidenced by lower output, fewer choices, and less technological progress [1250] CCC argues that the top-four networks represent a distinct and important resource for viewers because only they are able to consistently distribute both news and entertainment programming to a mass audience, using their cable subsidiaries and local broadcast affiliates [1251] Fox, on the other hand, argues that the rule actually undermines the Commission's competition policy by discouraging broadcast investment to the detriment of consumers of free over-the-air television.[1252] Fox also argues that the program acquisition market is only moderately concentrated, having an HHI of approximately 1120.[1253] In support of this argument, Fox asserts that the program acquisition market is characterized by a large number of purchasers of exhibition rights, including broadcast networks, broadcast stations, cable networks, DBS operators, premium cable networks, pay-per-view providers, and distributors of video cassettes and DVDs.[1254] NASA counters that the major broadcast networks do not compete with the cable networks for mass-audience, prime-time programs, and that the only avenue of distribution for such programs is the television broadcast networks [1255] NASA therefore asserts that only the major broadcasting networks should be considered in an analysis of concentration in the purchase of national video programming.[1256]

604. We agree with Fox and NASA that the context for analyzing the program acquisition market is to consider the shares of expenditures on video entertainment programming. We conclude, however, that a more accurate assay of the market includes the shares of broadcast networks, broadcast

(Continued from previous page)
integrated with News Corp and 20th Century Fox (a program supplier); and NBC (a broadcast network) is vertically integrated with NBC Entertainment's subsidiary NBC Studios (a program supplier)

1250 *See* NAB/NASA Comments at 58-60

1251 *See* CCC Comments at 17-18.

1252 Fox Comments at 48.

1253 Fox Economic Study E at 1. Fox economists excluded expenditures on news and sports programming because most of the inputs used in creating such programs are not readily substitutable with the inputs used in creating entertainment television programs and theatrical films.

1254 *Id*

1255 NAB/NASA Reply Comments at 57 By NASA's estimate, which is based on an analysis of Fox's Economic Study E, Table E2, the top-four networks account for over 87 percent of programming expenditures by broadcasting networks, and the video entertainment program acquisition market has an HHI of approximately 2100, a result considered "highly concentrated" under the DOJ/FTC Merger Guidelines. *Id.*

1256 *Id.*, citing its Comments at 74-75.

stations, basic cable networks, pay cable networks, and pay-per-view networks. We reject NASA's narrow definition because they provide no evidentiary reason to exclude other video programming purchasers and they dismiss the range of programming choices available to viewers over the air, via cable and via satellite. We do not agree with Fox's more expansive definition, specifically the inclusion of home video, as that requires additional action on the part of individual viewers, such as purchasing a DVD player, driving to a video rental store, and renting a DVD. We conclude that using broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks in our analysis accurately represents the market participants, and their role in delivering programming to large, passive audiences In order to examine the effect of mergers among broadcast television networks subject to this rule, we can construct hypothetical merger scenarios, building on the scenario developed in the national cap section of this Order. In the absence of actual figures for the network companies' broadcast station expenditures, we can only examine the effects of mergers amongst the networks (i.e., without their complement of O&Os, but including the cable networks they own). For the same reason, we can only calculate the change in the HHI, not the "base level" HHI So, for example, if Fox merged with GE and Disney merged with Viacom, the HHI would increase by almost 767 points. Then, if these two companies merged with each other, the HHI would increase by 2,246 points. Either of these changes in the HHI would be scrutinized under DOJ Merger Guidelines. Since these networks own television stations, the change in the HHI would actually be higher than in these examples.

605. Accordingly, we conclude that a merger between or among any of the top-four networks would harm competition in the program acquisition market. As noted, we determine in our analysis of the national ownership cap that an increase in the cap would not harm the program acquisition market, principally because networks would be enhancing their owned and operated distribution base. Our analysis of a merger between two or more of the top-four broadcast networks, however, indicates a significant potential for harm to this market. In addition to acquiring an entire group of owned and operated stations and all of the affiliation agreements of the stations aligned with the network, a merger would also entail the acquisition of significant program purchasing power by the vertically integrated merging networks. The vertically integrated networks would limit competitors' access to programming by denying remaining networks access to the production output of the merged network.[1257] In addition the merged firm can raise the price paid by those competitors for programming created and produced by the merged network's program production assets. The rule, therefore, remains necessary to promote competition in the program acquisition market.

(ii) National Advertising Market

606. Networks sell national advertising by creating large national audiences for their programming and delivering those audiences to advertisers. Sellers in the national advertising market include national broadcast networks, cable networks, and syndicators Network O&Os, network-affiliated stations, and independent stations sell national spot advertising time, which is advertising sold on a market-by-market basis to national advertisers National spot advertising time provides a competitive alternative to national advertising time to a certain extent These sellers compete against each other not only based on the price they charge for advertising spots, but also based on their ability to deliver the largest number of viewers to their advertisers If a merger were to reduce competition for advertising

[1257] Currently, one network studio may produce programming that is ultimately purchased by another network For example, Paramount, a subsidiary of Viacom, produces the long running NBC series "Frasier" and the NBC series "Ed " Also, in addition to producing shows for The WB network, Warner Brothers has produced shows for ABC ("The Drew Carey Show" and "George Lopez") and NBC ("ER" and "West Wing").

dollars, networks would have less incentive to compete against each other for viewers, which would lead them to pay less attention to viewers' needs and to produce less varied, lower quality, and less innovative programming

607 In our discussion above of the necessity of maintaining the national TV ownership rule,[1258] we conclude that the networks compete with each other and with cable networks for national advertising revenues and that the current ownership cap was not necessary to ensure competition in the national advertising market. However, while we find that the top-four networks do not possess market power today, that would change if two or more of them were to merge with each other. Moreover, as explained in the *Dual Network Order*, the top-four networks comprise a "strategic group" within the national advertising market.[1259] The top-four networks compete largely among themselves for advertisers that seek to reach large, national, mass audiences – a significant portion of the national advertising market that provides the top-four networks with a significant portion of their profits. We therefore conclude that a merger of two or more of the top-four networks would substantially lessen competition in the national advertising market, especially within the strategic group,[1260] with the concomitant harm to viewers described above.

608. The recent growth of cable and DBS does not alter our conclusion. Despite that growth, the top-four networks continue to provide the greatest reach of any medium of mass communications The top-four networks attract much larger prime-time audiences in relation to advertisement-supported cable networks.[1261] Broadcasting's percentage share of advertising revenue continues to exceed its

[1258] *See* Section VII(A), *supra*

[1259] *Dual Network Order*, 16 FCC Rcd at 11122-23 ¶ 20 A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies For example, the top-four networks supply their affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks The conceptual basis for a strategic group is developed in R. E. Caves and M E Porter, *From Entry Barriers to Mobility Barriers Conjectural Decisions and Contrived Deterrence to New Competition*, Q J ECON 91 (May 1977) 241-261 *Also see* Michael E Porter, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITION (New York· The Free Press, 1980), Ch. 7. For additional references on the application of the strategic group concept, see F M. Scherer and David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, (3rd ed) (Boston. Houghton Mifflin, 1990) at 284-85. When properly applied, the concept of a strategic group ordinarily implies that only a relatively few firms will be included within its boundaries so that competitive rivalry will be oligopolistic in nature, although the number of firms actually populating the industry aggregated over all strategic groups may be quite numerous.

[1260] Our analysis suggests that economic concentration within the strategic group for 2001, as measured by the HHI, is 2646 This is based on advertising revenue and on shares of the top-four broadcast networks as reported by Richard Bilotti, *supra* note 1106 Any HHI above 1800 indicates a "highly concentrated" market. *See DOJ/FTC Merger Guidelines*. A merger between two or more of the top-four networks would produce a change in the HHI of over 100 points, which, according to DOJ guidelines, is an indication that such a merger should be reviewed to ensure that it would not enhance market power or facilitate its exercise *Id*

[1261] For example, during the month of February, 2003 (1/27/03 – 2/23/03), CBS, NBC, ABC, and Fox delivered prime-time household ratings of 8 9, 8 1, 6 7, and 6.7, respectively, as compared to the top advertiser-supported cable network, TNT, which garnered a 1 8 share rating (A rating point is equal to 1.067 million households) *See* Television Bureau of Advertising, Viewer Track, *Monthly Broadcast vs. Cable Primetime Ratings· Feb-2003 vs.*
(continued . .)

percentage share of viewing.[1262] Moreover, despite a decrease in audience share, the top-four networks continue to command increases in advertising rates, a further testament to the strength of broadcasting television as an advertising medium.[1263]

609. We agree with NASA that despite the emergence of new media on cable, DBS, and the Internet, the top-four broadcast networks still have the largest concentration of viewers and television economic power.[1264] A recent survey shows that each of the top twenty-five prime-time broadcast programs during the week of December 9-15, 2002, all of which were aired by CBS, ABC, NBC, or Fox, achieved considerably higher household ratings than any of the 25 highest ranked cable programs.[1265] The highest-ranked broadcast program had a rating larger than the top five cable programs' ratings combined.[1266] We also agree that as it becomes more difficult to reach a large number of viewers, television broadcasters that can still deliver a mass audience become more valuable.[1267]

610 We further conclude, as we did in the *Dual Network Order*, that obtaining a sufficient number of affiliated stations remains a major obstacle to developing a new broadcast network capable of attracting national advertisers seeking to reach a mass audience.[1268] As long as mobility barriers[1269] deter entry into the major network strategic group, the pricing of network advertising will be sensitive to the number of network competitors.[1270] We therefore conclude that the current dual network rule is necessary

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Feb-2002, at http //www tvb org/rcentral/viewertrack/monthly/mon-b-c/mon-b-c.asp?ms=Feb-2003_vs_Feb-2002 html (visited March 7, 2003)

[1262] *See e g.*, NAB/NASA Comments at 13, stating that broadcasting's share of advertising revenue in 2001 was 71 5% whereas its audience share stood at 53 7% In addition, the networks have been able to increase the quantity of advertising availabilities for sale by adding more commercial minutes per hour. *Id.*

[1263] The networks have raised prices for advertising on a cost per thousand ("CPM") viewers basis steadily. Prime-time broadcast network CPMs have increased from $9.74 in 1990 to $13.42 in 2000, an average annual growth rate of 3 8% *See* OPP Working Paper 37 at 28 In addition, an advertising industry compilation indicates that the top-four commercial networks increased hourly commercial minutes by 16 4% from 1991 to 2000, from an average of seven minutes and 47 seconds to an average of nine minutes and three seconds. *Id.*

[1264] NAB/NASA Comments at 74

[1265] *Id*, citing Television Bureau of Advertising, Inc , Viewer Track, *Top 25 Programs on Broadcast and Cable: Week Ending Dec 15, 2002, at* http //www.tvb org/rcentral/index html (visited Jan 1, 2003)

[1266] *Id.*, citing also its earlier notes 34-35 and accompanying text (observing that 99 of the 100 top-rated prime-time programs are broadcast programs, and that the combined average viewership for the four major broadcast networks is almost six times as high as that of the top ten ad-supported cable networks)

[1267] *See* NAB/NASA Comments at 75.

[1268] *Dual Network Order*, 16 FCC Rcd at 11123 ¶ 20 *See also* NAB/NASA Comments at 73.

[1269] Mobility barriers are barriers to entry that deter the movement of a firm *within* a given industry from shifting from one strategic group to another. Different strategic groups will be defended by different mobility barriers that vary in their effectiveness in restricting entry into a given strategic group. In general, firms protected by high mobility barriers will have greater profit potential than firms in other strategic groups protected by low mobility barriers to maintain competition in national advertising market

b. Localism

611. We conclude that the dual network rule also is necessary to retain the balance of bargaining power between the top-four networks and their affiliates. As noted in the national TV ownership rule section, we conclude that affiliates play an important role in assuring that the needs and tastes of local viewers are served[1271] Elimination of the dual network rule would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities.[1272]

612 The top-four networks have an economic incentive to promote the widest distribution nationwide of the programming that they produce and to assure that it is carried simultaneously across the country. To reach the most viewers, the top-four networks acquire their own stations ("O&Os"), usually in the largest television markets, and enter into affiliation agreements with station owners throughout the remainder of the country. Through affiliation, the networks benefit from the wide-area delivery of their programming. Network affiliates benefit, in turn, by gaining access to high-quality programming.

613 Affiliates have an economic incentive to tailor their programming to their local audiences. Affiliates can influence network programming decisions by joining forces with other network affiliates in collective negotiations to ensure that the programming provided by the network serves local needs and interests The strength of an affiliate's influence with its network lies in its power as part of a "critical mass" to join forces with other network affiliates in collective negotiations to try to influence network programming.[1273] On an individual basis, affiliates may also decide to preempt network programming if other programming is available that better suits local needs.

614 As noted by NASA, because of the costs of programming and promotional expenses, network affiliation remains critical for the economic survival of most local television stations.[1274] NASA argues that if the dual network rule were eliminated, a top-four network merger would result in the networks gaining an unfair advantage over their affiliates, noting that a merger would reduce alternative choices of program providers for affiliates as the number of network owners decreases.[1275] As an example, NASA notes that if NBC and CBS were permitted to merge, a terminated CBS affiliate would no longer be able to turn to NBC for affiliation.[1276] The harm would be exacerbated if more than two of the top-four networks were to combine.

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[1270] *See also* NAB/NASA Comments at 75

[1271] *See* Section VII(A), *supra*

[1272] *See id* for a discussion of localism and its importance in the balance of power between networks and their affiliates.

[1273] NAB/NASA Comments at 2-3

[1274] *Id*

[1275] *Id.* at 75-76

[1276] *Id*

615 We agree with NASA that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates. While a top-four network merger may not result in fewer networks, it would result in fewer network *owners*. We conclude that a top-four network merger would reduce the ability of affiliates to bargain with their network for favorable terms of affiliation, and would result in less influence of affiliates on network programming As the number of network owners declines, affiliates lose the ability to use the availability of other top independently-owned networks as a bargaining tool with their own networks. In the same way, a combined top-four network's increased leverage could be used to overwhelm affiliate bargaining power with respect to programming issues A top-four network merger would lead to fewer alternatives for affiliates, which would lead to reduced bargaining power of affiliates, and less influence of affiliates on network programming, including the ability to preempt network programming that affiliates find to not serve their local communities. We therefore conclude that the dual network rule remains necessary to foster localism

c. Diversity

616. In the *Notice*, we sought comment on the dual network rule's effect on program diversity and viewpoint diversity.[1277] As noted in the national TV ownership rule section, we conclude that the market for diversity is local, not national [1278] As also noted, we conclude that viewpoint diversity is the most pertinent aspect of diversity for purposes of our ownership rules.[1279] Nevertheless, since several commenters argue that elimination of the dual network rule would result in a diminution of program diversity, we address their arguments.[1280]

617. Several commenters argue that elimination of the dual network rule would result in less diverse programming and that national viewpoints in news reporting would be diminished.[1281] AFL-CIO and AFTRA argue that recent mergers and consolidation in the industry have resulted in instances of reduced viewpoint diversity and program diversity in local markets.[1282] AFTRA also argues that elimination of the rule will quell new voices and diverse viewpoints, "as emerging networks are quashed

[1277] *Notice*, 17 FCC Rcd at 18553-54 ¶¶ 160-163

[1278] *See* Section VII(A) *supra*.

[1279] *See id*

[1280] *See* UCC Comments at 59-61, NAB/NASA Comments at 78; AFL-CIO Comments at 61-62, AFTRA Comments at 34; and CCC Comments at 19

[1281] *See* CCC Comments at 19, UCC Comments at 59, AFL-CIO Comments at 61-62, AFTRA Comments at 34-35, and NAB/NASA Comments at 78

[1282] AFL-CIO Comments at 61-62, gives the following as examples: Viacom in Philadelphia owns the local CBS and UPN television stations and KYW-AM radio, and has assigned radio anchors to produce news for UPN, Viacom in Detroit dropped its local CBS-TV news and has contracted WXYZ to produce its UPN-TV news, and NBC is combining its news operations with Telemundo. AFL-CIO further states that BET, which is now owned by Viacom, has cancelled several news-related and public affairs shows, and that NBC O&Os have begun to merge station operations with Paxson TV affiliates, only rebroadcasting NBC news on PAX stations *See also* AFTRA Comments at 34-35 in favor of more 'cost-effective' means of delivering content "[1283] CCC argues that because CBS is "repurposing" its original programming on UPN, diversity between the two networks is reduced.[1284] CCC also argues that WB, UPN, and the cable networks do not have the audience reach or the resources to fill the diversity void created if the national networks were reduced by elimination of the rule.[1285] Fox disagrees, arguing that the vast array of other media outlets will provide the public with sufficiently diverse information and views.[1286]

618. One commenter, UCC, argues that despite recent gains in the popularity of other forms of media, national broadcast television continues to be the public's most important source for national and international news.[1287] UCC argues that the average weekday reach of the evening newscasts of ABC, CBS and NBC is about 10 times the combined reach at 6.30 p.m. for Fox, CNN, CNN Headline News, MSNBC, and CNBC.[1288] Because network news on broadcast television is expensive to produce, UCC argues, a top-four network merger would result in the consolidation of news departments in order to achieve economic efficiency [1289]

619. In the *Dual Network Order*, the Commission found that program diversity at the national level would not likely be harmed by the combination of an emerging network (*i.e* , UPN or WB) with one of the top-four networks The Commission found it likely that a common owner would have strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market.[1290] In this proceeding, we address possible combinations among only the top-four networks, which are distinct from combinations between a top-four network and an emerging network.[1291] Also, we

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[1283] AFTRA Comments at 34.

[1284] CCC Comments at 19

[1285] *Id* at 18

[1286] Fox Comments at 44-45

[1287] UCC Comments at 60.

[1288] *Id.* at 60 (citation omitted).

[1289] *Id* at 60-61.

[1290] *Dual Network Order*, 16 FCC Rcd at 11131 ¶ 37. Fox argues in this proceeding that a top-four network merger would result in the same incentives for the merged firm, and that all network outlets, regardless of ownership, will continue to pursue the elusive goal of divining audience tastes. Fox Comments at 45-47.

[1291] We agree with NAB/NASA that the Viacom/UPN (top-four network/emerging network) example cannot be extrapolated to a situation in which a top-four network takes over another one (with which it directly competes), because, as admitted by Viacom, CBS and UPN do not compete for the same viewers. *See* NAB/NASA Reply Comments at 59-60 NAB/NASA notes that in the 2001 Dual Network proceeding, Viacom argued that CBS did not really compete with UPN. Rather, it stated that its principal competition came from the broad-based traditional networks operated by ABC, NBC, and increasingly Fox. NAB/NASA Comments at 77, citing Viacom's Comments to the *Notice of Proposed Rulemaking* in MM Docket No 00-108, 15 FCC Rcd 11253 (2000) at 22. *See also* Fox Comments at 46, where Viacom states that "CBS and UPN have set their sights on entirely different demographics " find in this proceeding that the market for diversity is local, not national.[1292] Further, as noted in the Policy Goals section above, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation [1293]

620. We are unable to conclude that the dual network rule can be justified on program diversity or viewpoint diversity grounds Although we received conjectural statements regarding the repurposing of some programming, and stories of news operations being shared in a few markets, these reports do not evidence a systematic reduction in diversity as a result of media mergers The record provides no evidence that, because some stations share news operations, viewpoint diversity is diminished. Further, even if a merger among ABC, CBS, or NBC would result in the loss of one weekday evening newscast, a substantial number of outlets that report national/international news would remain to provide diverse viewpoints throughout the day to the public.[1294] Finally, to the extent that we consider programming diversity an issue, the record provides no evidence that the repurposing of programming on different networks results in a diminution of program diversity. In fact, we found in the *Dual Network Order* that the repurposing of programming between two merged networks was likely to produce net benefits to viewers of network television [1295]

3. Conclusion

621 Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a "strategic group" in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. These competitive harms would, in turn, harm viewers through reductions in program output, program choices, program quality, and innovation. We further conclude that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates, reducing the ability of affiliates to bargain with their network for favorable terms of affiliation, giving the networks greater power in program selection, and diminishing alternative choices of programming for affiliates. As a result, we conclude that the dual network rule remains necessary in the public interest to foster competition and localism.

VIII. MISCELLANEOUS REQUESTS

622 Numerous parties submitted comments on issues not specifically raised in the *Notice*. As discussed below, we dismiss most of these requests on procedural grounds because they fall outside the scope of this proceeding We do not review the merits of these requests. To the extent appropriate, parties are free to re-file these requests as petitions for rulemakings. We deny others for the reasons discussed herein.

[1292] *See* Section VII(A), *supra*.

[1293] *See* Section III(A)(2), ¶ 37, *supra*.

[1294] These outlets include cable news networks, daily and weekly newspapers, magazines, and the numerous news-related websites on the Internet *See* Appendix B, listing all national news sources In any event, we question the assumption that a merger among ABC, CBS, or NBC would result in the elimination of a news department, particularly considering that each network currently attracts a substantial number of viewers to its weekday evening newscast

[1295] *See Dual Network Order*, 16 FCC Rcd at 11124-25 ¶ 24.

A. Requests That Are Outside the Scope of the Proceeding

1. Proposed Behavioral Rules.

623 Several parties ask that we impose behavioral rules to achieve a number of alleged public interest goals. We invited comment in the *Notice* as to whether behavioral rules might render structural rules unnecessary to achieve our public interest goals of diversity, competition, and localism.[1296] The following proposals, however, relate to policy goals that are unrelated to those served by our structural rules and are therefore outside the scope of the *Notice*.

624 *TV Viewing* TV Turnoff Network requests that we require all broadcast stations to run announcements reminding the viewing public that: (1) excessive television viewing has negative health, academic, and other consequences for children, and (2) parents and guardians retain and should exercise their First Amendment right and ability to turn off their television sets and limit their children's viewing time.[1297] We dismiss this request because it is outside the scope of this proceeding, which reviews our structural broadcast ownership rules pursuant to Section 202(h) Indeed, the goals sought to be advanced by the proposal bear no relation to diversity, competition, or localism.

625 *PEG*. Alliance requests that we promulgate behavioral regulations that guarantee public, educational, and governmental ("PEG") access on cable and direct broadcast satellite ("DBS") to ensure diversity of voices Alliance argues that such federal regulations are necessary because PEG access is not mandated by federal legislation, but rather derives from a statute that allows local communities to regulate it [1298] We dismiss Alliance's request as outside the scope of this proceeding and our authority, generally. The Commission once had access requirements of the type suggested by Alliance, but the Supreme Court struck them down as beyond our statutory authority.[1299] Section 611 of the Act, as amended by the Cable Communications Policy Act of 1984, states that franchising authorities may require operators to designate channel capacity for public, educational and governmental access use as part of their franchise agreement [1300] Congress did not authorize the Commission, however, to implement, enforce, or oversee the broad local access requirements advocated by Alliance.[1301] We note, however, that noncommercial educational television stations may request mandatory carriage on cable systems[1302] and also have satellite carriage rights in markets where DBS provides local-into-local service pursuant to the "carry-one-carry-

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[1296] *Notice*, 17 FCC Rcd at 18520, 18521 ¶ 49

[1297] TV-Turnoff Comments at 1-8.

[1298] Alliance Comments at 4-6 47 U.S C § 542(c)(2)

[1299] *See FCC v Midwest Video Corp.*, 440 U S 689 (1979) (authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress). *Id* at 708.

[1300] 47 U S.C. § 531.

[1301] Although DBS is required to set aside 4% of capacity for public interest ("non-commercial, educational, and informational") programming pursuant to Section 335 of the Act, we do not have authority to adopt the broader rights advocated 47 U.S.C § 335(b) and 47 C F R 25 701.

[1302] 47 U S C § 535.

all" requirements under Section 338 of the Act.[1303]

626 *Payola.* Future of Music Coalition alleges that a new form of payola exists in which record companies pay independent promoters to ensure that the companies' records are played on the radio The independent promoters, Future of Music Coalition alleges, then establish exclusive relationships with radio stations and pay these radio stations a large portion of the money received from the record companies in the form of "promotional expenses." Future of Music Coalition asks that we ban this practice, thereby promoting diversity in radio programming.[1304] We dismiss Future of Music Coalition's request because it is outside the scope of the *Notice* and this proceeding.

2. Ownership Issues Outside the Scope of the Proceeding.

627. Some parties request action regarding ownership or attribution issues that were not raised in the *Notice* and that are therefore outside the scope of the proceeding.[1305] We dismiss these requests.

628. *Alien Ownership.* CanWest suggests that our biennial review of media ownership rules and the multilateral trade in services negotiations underway in the World Trade Organization provide a timely occasion to review foreign ownership rules for broadcasting.[1306] We decline to undertake such a review because it would be outside the scope of this proceeding Moreover, to the extent that our foreign ownership regulations are statutorily based,[1307] we do not have the discretion to modify or repeal them in the biennial review process, pursuant to Section 202(h).

629. *Attribution.* MMTC asks us to expand this proceeding to include review of the attribution rules.[1308] We deny this request because, as we stated in the *Notice*, the attribution limits are not properly reviewed in the biennial review process,[1309] except for review of radio joint sales agreements ("JSAs"),

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[1303] 47 U S C § 338

[1304] Future of Music Coalition Comments at 91-92

[1305] We decline to engage in a far reaching inquiry into possible harms in markets that are outside the Commission's jurisdiction or outside the scope of this proceeding *See, e.g.*, Jennifer Poole Comments at 1-2 (arguing that consolidation will lead to a loss of pay and benefits for editorial writers)

[1306] CanWest Comments at 8-10

[1307] 47 U S C. § 310

[1308] MMTC Dec 9, 2002 Comments at 4

[1309] The attribution rules do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under the ownership rules. The focus of the biennial review process is whether the ownership rules are necessary in the public interest as a result of competition The attribution limits are set at the level the Commission believes conveys influence or control and, as these limits are not related to any changes in competitive forces, they are not reviewed biennially *Notice* at n.13. *See 1998 Biennial NOI*, 13 FCC Rcd at 11280 ¶ 10.

which we address in the Local Radio Ownership section above.[1310]

630 *LPFM* REC Networks requests that we refrain from changing our Low Power FM ("LPFM") rules relating to ownership caps and assignment of stations because these rules are consistent with our intentions in establishing LPFM.[1311] LPFM ownership and assignment rules are addressed in Sections 73 855, 73.858, 73 860, and 73.865 of the Commission's rules, adopted in 2000,[1312] and are not addressed in the context of this proceeding. These are non-commercial stations and therefore a consideration of ownership limits for these stations is outside the scope of this proceeding. REC also asks that we impose new ownership restrictions on non-commercial educational stations We dismiss that request as such limits are outside the scope of this proceeding.

631 *Broadcast Auction Process* Hodson recommends that we modify the new entrant bidding credit in the broadcast auction process from the current percentages of 25 percent and 35 percent to 30 percent and 45 percent. Hodson also recommends, in its proposed 30 percent tier, that we allow an attributable interest in five mass media facilities nationwide instead of the current three, with the condition that the winning bidder has no attributable interest in a broadcast presence already in the market the proposed broadcast station intends to serve. Finally, for entities eligible for Hodson's proposed 45 percent tier, Hodson recommends that we establish a relaxed payment plan for the winning bid balance that would include an extended payment schedule [1313] Hodson's proposals go to our broadcast auction rules and process, not our ownership rules. These proposals are not a logical outgrowth of the *Notice* and they are therefore outside the scope of this proceeding.[1314]

3. Translator/Spectrum Issues Outside the Scope.

632. REC also makes other requests involving our rules applying to use of translators. REC claims that the current rules allow distant translators and discourage establishment of new local LPFM stations.[1315] Nickolas Leggett asks that we provide alternative opportunities to small broadcasters including (1) a frequency band for manually operated low-power commercial broadcasters; (2) a citizens

[1310] As addressed more fully in our Local Radio Ownership section above, in 2001, we sought comment on whether JSAs should be attributable *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894 ¶¶ 82, 83. That NPRM was incorporated into this proceeding

[1311] REC Networks Comments at 2-4

[1312] 47 C F R. §§ 73.855, 73 858, 73 860, 73 865. *See Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000).

[1313] Hodson Reply Comments at 75-81; Hodson IRFA Comments, MM Dkt. No. 01-317, MM Dkt No. 00-244, Feb 28, 2002 at VII.

[1314] We addressed the broadcast auction process in a prior rulemaking proceeding. In 1998, the Commission determined that it would fulfill its obligations under Section 309(j) of the Communications Act of 1934, 47 U.S.C § 309(j)(3)(B), to promote economic opportunity and competition for designated entities, including small businesses, by providing new entrant bidding credits *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15992-97 (1998), *granted in part and denied in part*, 14 FCC Rcd 8724 (1999), *amended by* 14 FCC Rcd 14521 (1999) Changes to these bidding credits would require a separate rule making

[1315] REC Networks Comments at 2-4.

broadcasting band; and (3) open-microphone neighborhood broadcasting supported by the consolidated broadcasters [1316] We deny these requests that we change our translator rules or afford spectrum to small broadcasters because they are outside the scope of the proceeding.

B. Proposals Addressed in Other Commission Proceedings.

633. *Cable Ownership.* CCC requests that we retain our 30% national cable system ownership limits [1317] We dismiss CCC's request because it is outside the scope of this proceeding and it relates to an issue that is the subject of a separate rulemaking.[1318]

634. *DTV* USCCB asks us to promulgate regulations that define digital television ("DTV") broadcasters' public interest obligations.[1319] We dismiss USCCB's request because it is outside the scope of this proceeding. CST requests that we amend or eliminate any of our rules that hinder the digital conversion of broadcasters, cable systems, and telephone systems, and that we establish regulatory policies to encourage the introduction of digital technologies.[1320] We dismiss CST's requests because they are outside the scope of this proceeding.[1321] Further, CST proposes that all broadcast licensees and cable systems that expand their operations as a result of rule relaxations be required to loan a percentage of their expansion revenues to a Digital Conversion Fund.[1322] We decline to adopt CST's proposal because there is no basis for the Commission to directly fund industry's transition to digital television. When Congress established the framework for the digital television transition in the Telecommunications Act of 1996, it gave no indication that the Commission should directly fund industry transition costs for digital television. Even if CST's proposal fell within Congress's directives, the establishment of such a fund raises extraordinarily complex and controversial issues such as the measurement by the Commission of 'merger efficiencies' and how the fund would be administered. CST provides us with no meaningful basis to assess the viability or effectiveness of such a program. Finally, as explained in Section VI above, the Commission already has considered the relationship between local television consolidation and the

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[1316] Nickolas Leggett Oct. 28, 2002 Comments at 5

[1317] CCC Comments at 24.

[1318] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 (2001).

[1319] USCCB Reply Comments at 1-13.

[1320] CST Reply Comments at 4-5

[1321] The Commission is undertaking a second periodic review of the progress of the transition to DTV *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1279 (2003). This *Notice of Proposed Rulemaking* seeks additional comment from the public to refresh the record in three outstanding DTV public interest rulemaking proceedings: *Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd 21633 (1999), *Notice of Proposed Rule Making, Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000), and *Notice of Proposed Rule Making, Children's Television Obligations of Digital Television Broadcasters*, 15 FCC Rcd 22946 (2000) The second DTV periodic review *Notice of Proposed Rule Making* also seeks comment on a large number of issues related to the progress of the DTV transition and steps the Commission could take to facilitate the transition

[1322] CST Reply Comments at 7.

transition to digital television We determined that the efficiencies from relaxing the local television ownership limit would likely promote the transition to digital television.

C. Requests That We Delay the Proceeding or Seek Further Information

635 Some parties ask us to undertake additional studies or delay taking action until after some future events [1323] We decline to delay action in this proceeding. Our statutory obligation is to review the rules biennially; we have no discretion to willfully deviate from that schedule.

636. *IBOC-DAB.* VCPP requests that there be no relaxation on ownership restrictions until several years after 100% rollout of In Band On Channel Digital Audio Broadcasting ("IBOC-DAB"), arguing that this technology will destroy competition [1324] We deny VCPP's request. The courts require us to base our ownership decisions on today's marketplace and the facts presently before us. We are not free to adopt a "wait and see" approach.[1325] The impact of IBOC-DAB on diversity, competition, and localism in local media markets will be accounted for in future biennial reviews.

637. SBA asks us to issue a Further Notice of Proposed Rulemaking in this proceeding, claiming the *Notice* is not specific enough to comply with the Administrative Procedure Act or the Regulatory Flexibility Act.[1326] We disagree with SBA and deny its request. Contrary to the implication of SBA, the actual rules at issue in this proceeding are specifically identified in the *Notice* and well known to all interested parties – they are our current broadcast ownership rules. Congress has directed us to review those rules every two years to determine whether those exact rules remain necessary in the public interest. That we have done in this proceeding in accordance with the *Notice.* Further, Congress directed the Commission to eliminate or modify any of its broadcast ownership rules that no longer are necessary. Again, it was explicit in the *Notice* that we might eliminate any rule that could not be justified in light of the current media marketplace. To the extent that we have eliminated rules herein, therefore, there has been no failure of notice. With respect to those rules that, having been found unnecessary, have been modified herein, the question is the familiar one – were the modifications a "logical outgrowth" of the issues identified in the *Notice.* We conclude that this *Order* and its accompanying rules are a logical

[1323] MMTC filed a motion requesting that we postpone our vote on this *Order.* MMTC argues that because our Electronic Comment Filing System ("ECFS") was overloaded with filings immediately prior to our June 2, 2003 vote, the record does not accurately reflect all comments received in this proceeding and, therefore, parties are unable to respond to the complete record MMTC Motion for a Brief Postponement of the Vote (May 31, 2003). We deny the motion The Reply Comment period closed Feb 3, 2003, more than four months ago. Nonetheless, in the interests of assembling a full record, the Commission has continued to accept comments, and more than 500,000 comments were filed in this proceeding, many of which were filed at the last minute Given the large volume of last minute filings, it is inevitable that a small percentage would not be placed on our ECFS system or be available in the public reference room in sufficient time for replies. Nonetheless, the record is complete, and MMTC's failure to file its comments or requests in a timely fashion is no excuse to delay the proceeding Nickolas Leggett asks us to engage in detailed political science analysis of the impact of removal of ownership caps on the legitimacy of government and business. Nickolas Leggett Nov. 15, 2002 Comments at 4. We deny this request because it is unclear.

[1324] VCPP Comments at 1-2

[1325] *Fox Television,* 280 F 3d at 1042

[1326] SBA March 13, 2002 Comments at 2-5, SBA April 9, 2003 Comments at 3-5 outgrowth of the questions posed in the *Notice*. The modifications made herein are consistent with the issues and questions posed in the *Notice*, and take account of the full record in this proceeding Finally, we take seriously the mandate of Section 202(h) to review our broadcast ownership rules every two years. It would be impractical to complete such a Herculean task, in this case, to review six different rules, and to complete that review in time to start another review, if we issued a separate notice detailing modifications to rules and initiated another comment period.

638. Children Now asks that we reserve our decision-making on media ownership until its research on the effects of media consolidation on children is complete and can be incorporated into our record [1327] Laura Smith requests that we expand the scope of our public hearings on media ownership and that we conduct additional research before concluding this proceeding.[1328] We decline to further delay this proceeding The public, industry, and government agencies alike have an interest in finality, economy, and the avoidance of unnecessary delay. The public is not served by bureaucratic inaction; industries suffer when rules that restrain behavior without cause continue in force, and agencies fail in their responsibility when they commit public resources to meaningless exercises of no decisional significance. As a corollary, agencies should not refrain from acting on an issue once a robust record has been developed It is the agency's responsibility, in the first instance, to determine when that point has been reached.[1329]

639. In this case, we see no overriding need to augment the record, nor do we believe that the expenditure of additional time and resources in an effort to do so will provide us with a significantly more accurate or current assessment of the media markets. To the contrary, the record in the current proceeding is one of the most factually complete and thorough ever assembled in a Commission rulemaking. In addition, the court in *Fox Television* made it quite clear that regulatory delay in the biennial ownership review process is causing hardship to the parties and should not be tolerated.[1330] Accordingly, we deny the requests of Children Now and Laura Smith.[1331]

D. Independent Producers.

640. *Independent Production Rules.* The Coalition for Program Diversity ("CPD") asks us to take "content neutral action" by "adopting a 25% Independent Producer Rule that will insure [*sic*] that the

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[1327] Children Now Comments at 1-2 Also, on May 21, 2003, Children Now issued a study finding that, in the Los Angeles, California DMA, the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations *See* Section VI *supra* for a discussion. *Children Now Report* 2, 5-6, 9

[1328] Laura Smith Reply Comments at 27-33.

[1329] *United States v. FCC*, 652 F.2d 72, 90-91 (D C. Cir. 1980) (en banc) ("Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission . . . . To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay ")

[1330] *Fox Television*, 280 F.3d at 1039 ("retention of the Rules in the interim significantly harms both the networks and Time Warner")

[1331] We address other requests of Children Now *supra* prime time programming aired by the four networks is as diverse as possible."[1332] In a similar vein, the Writers' Guild of America ("WGA") proposes a requirement that broadcast and cable national program services purchase at least 50 percent of the entertainment for their prime time schedules from independent producers.[1333] In essence, CPD and WGA ask us to re-impose some version of our prior financial interest/syndication rules, first adopted by the Commission in 1970.[1334] We reject these requests (collectively, the "Fin/Syn Proposals")

641 To begin with, there is substantial doubt as to whether we have adequate notice to adopt the Fin/Syn Proposals. In the *Notice*, we invited comment on, among other issues, whether diversity could be better promoted by alternatives to structural regulation, such as behavioral requirements and, if so, what behavioral requirements would be recommended [1335] The Commission also sought comment on whether "the effects of the 1996 change in the national ownership cap [can] be separated from the effects of the repeal of the fin/syn and [prime time access] rules?" The Commission asked commenters to identify those effects.[1336]

642 Although we invited comment as to whether we should, in lieu of structural rules, adopt behavioral rules to serve our public interest goals, we did not propose a re-imposition of the fin/syn rules, or anything related. The Fin/Syn Proposals, therefore, are not squarely within the four corners of our *Notice* Moreover, to the extent that we asked general questions about the effect of the repeal of our former fin/syn rules, or whether some behavioral rules might obviate structural regulation, we did not intend, nor do we think the *Notice* can be fairly read to suggest, that a fin/syn overlay would or could substitute for structural regulation as a means of protecting our desiderata -- localism, competition, and diversity. Accordingly, we do not believe that the Fin/Syn Proposals are responsive to the *Notice*, or that the adoption of such rules could be thought to be a logical outgrowth of the *Notice.*

643 In any event, we are not inclined to adopt the Fyn/Syn Proposals. The original fin/syn rules prohibited a television network (defined at the time to include only ABC, NBC, and CBS) from syndicating television programming in the U S., or from syndicating outside the U.S. programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication These rules also prohibited a network from acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of television programming produced by someone other than the network for distribution on non-network stations.[1337] In 1983, the Commission proposed repealing the rules based on, *inter alia*: (i) a 44% increase in the number of TV stations available to the average viewer since 1970, (ii) the dramatic increase in the availability of cable television; and (iii) evidence of vigorous competition among the television

[1332] CPD Comments at i, 8-10, 34-37, Reply Comments of CPD at 9, *see also* Malla Pollack Comments at 2.

[1333] Joint Comments of Writers Guild of America, et al , at 3.

[1334] Ex Parte Filing of ABC, Disney, FOX, NBC, Viacom (Apr. 29, 2003) at 1 (referencing *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C C 2d 382 (1970)).

[1335] *Id.* ¶ 49

[1336] *Id.* ¶ 141

[1337] *Schurz Communications, Inc*, 982 F 2d at 1045 networks [1338]

644 In 1991, however, the Commission opted not to repeal the rules, but instead modified them. Among other things, the Commission imposed a new restriction on networks, which provided that "no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself."[1339] In 1992, the U.S. Court of Appeals for the Seventh Circuit vacated the rules [1340] The Court criticized the Commission for not addressing earlier Commission findings, in 1983, that the networks lacked significant market power. The Court found that the development of cable, video recorders, and the advent of the Fox network buttressed the earlier findings.[1341]

645 In the proceedings on remand, the Commission decided to repeal, on a graduated basis, most of its fin/syn rules.[1342] In repealing the 40 percent cap, the Commission observed that the cap does not necessarily foster diversity.[1343] The Commission also noted that "the decline in network audience share, which largely explained the rule's relaxation in 1991, has continued unabated."[1344] On appeal, the Seventh Circuit affirmed that decision, stating that if the Commission ever decided to re-impose similar fin/syn restrictions on the networks, "it had better have an excellent, a compelling reason" to do so.[1345]

646 In 1995, the Commission removed the remaining fin/syn restrictions, finding that there was no "clear trend toward increased network ownership of [prime time entertainment programming] that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint."[1346] At the time, independent producers provided 80.97% of the prime time programming hours for ABC, CBS and NBC [1347] Although there had been a decline in the number of packagers of programming included in the prime time schedules for ABC, CBS and NBC, the Commission believed that the decline could not be attributed to elimination of the fin/syn rules, but was "instead attributable to the inherent riskiness of prime time programming."[1348] Moreover, ABC, CBS, and NBC faced more, rather than less, competition in broadcast television due to the emergence of FOX and two additional broadcast networks (United Paramount and Warner Brothers).[1349] The Commission also

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[1338] *Amendment of the Syndication and Financial Interest Rules,* 94 F.C.C 2d 1019, 1057-63 (1983).

[1339] *Schurz Communications*, 982 F 2d at 1046

[1340] *Id* at 1055

[1341] *Id* at 1046, 1053

[1342] *Evaluation of the Syndication and Financial Interest Rules,* 8 FCC Rcd 3282 (1993).

[1343] *Id.* at 3299 ¶ 38

[1344] *Id.* at 3303 ¶ 44

[1345] *Capital Cities/ABC, Inc v FCC,* 29 F.3d 309, 316 (7th Cir 1994).

[1346] *Review of the Syndication and Financial Interest Rules,* 10 FCC Rcd 12165 ¶ 21 (1995).

[1347] *Id*

[1348] *Id* at 12169 ¶ 20.

[1349] *Id* at 12170 ¶ 26

reaffirmed its finding in 1993 that alternative video delivery systems, such as DBS and wireless cable, provided sufficient competition to the broadcast networks to obviate fin/syn restrictions.[1350]

647. CPD now argues that, despite the growth of cable and DBS providers in the video programming distribution market, there still is a strong public interest supporting limitations on network programming because 43 million consumers receive only broadcast network television.[1351] CPD also points out that in 1992, 66.4 percent of the networks' prime time schedule consisted of programs produced and owned by independent producers Today, they argue, only 24 percent of the four largest networks' prime time schedule is supplied by independent producers.[1352] CPD argues that the Commission should preserve 25 percent of the networks' prime time schedule for independent producers.

648. WGA asks that the Commission "adopt measures designed to insure [*sic*] that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers."[1353] WGA contends that consolidation in the market for video programming makes any appearance of diversity a mirage. Although there are 230 national cable programming networks, according to WGA, there are just 91 networks that can be considered major networks (defined by WGA as available in more than 16 million homes) Of these 91 networks, 80 percent (73) are owned or co-owned by 6 entities: AOL Time Warner, Viacom, Liberty Media, NBC, Disney and News Corporation.[1354]

649 Four major networks (ABC, CBS, FOX, and NBC, collectively the "Networks") filed a joint ex parte pleading opposing any cap on the amount of network programming a network may air during prime time. The Networks invoke much of the rationale that the Seventh Circuit used when it vacated the Commission's prior fin/syn rules [1355] To those arguments, the Networks add that the broadcast networks' prime time audience share has dropped from 72 percent in 1993-1994 to 58.9 in 2001-2002.[1356] The Networks assert that CPD's argument ignores the fact that, whereas there were only three broadcast networks in 1970 when the Commission first adopted the fin/syn rules, there are now seven networks providing English language programming.[1357] The Networks also argue that the growth in use of the DVD player, personal video recorder, and the Internet continues to add to the diversity in video programming and continues to undermine any rationale for fin/syn rules.[1358] Even accepting WGA's assertion that six companies own many of the major cable networks, the Networks argue that the market for video programming is more diverse today because six is double the number of companies that owned

[1350] *Id* at 12171 ¶ 27.

[1351] CPD Reply Comments at 2

[1352] *Id.* at 4

[1353] WGA Comments at 3

[1354] *Id* at 10

[1355] ABC, NBC, Disney, Fox and Viacom Apr. 29, 2003 Ex Parte at 2-3.

[1356] *Id* at 2-5.

[1357] *Id.* at 2-8

[1358] *Id* at 2-7